Supreme Court, U.S.
FILED
FEB 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1216

In The

Supreme Court of the United States

October Term, 1988

PATRICIA B. TAYLOR,

Petitioner,

v.

FIRST UNION CORPORATION OF SOUTH CAROLINA AND FIRST UNION CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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February 14, 1989

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QUESTIONS PRESENTED

1. Does Rule 10b-5 require a nexus between the fraud and the sale of securities?

2. Does either a rejected suggestion of a possible future merger or discussions that do not rise to the level of preliminary merger negotiations constitute a material fact under Rule 10b-5?

TABLE OF CONTENTS

Page

Questions Presented i

Statement of the Case 1

Reasons Why the Writ Should be Denied 2

I. The Fourth Circuit's holding that Rule 10b-5 requires a nexus between the fraud and the sale of securities is consistent with the decisions of this Court and of other circuits 2

II. The Fourth Circuit correctly concluded that there was insufficient evidence of a conspiracy 4

III. The Fourth Circuit strictly followed *Basic, Inc. v. Levinson* 5

Conclusion 6

TABLE OF AUTHORITIES

Page

CASES:

Basic, Inc. v. Levinson, 108 S. Ct. 978 (1988) 2, 5, 6

Rochelle v. Marine Midland Grace Trust Co., 535 F.2d 523 (9th Cir. 1976) 3

Smallwood v. Pearl Brewing Co., 489 F.2d 579 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974) 4

Taylor v. First Union Corp., 857 F.2d 240 (4th Cir. 1988) 2, 6

STATUTES AND REGULATIONS:

17 C.F.R. § 240.10b-5, SEC Rule 10b-5 ..... 2, 3

Rule 17, Rules of the Supreme Court of the United States 6

First Union Corporation of South Carolina, formerly Southern Bancorporation ("Southern"), and First Union Corporation ("First Union")* submit this response to the Petition for a Writ of Certiorari received on January 18, 1989.

STATEMENT OF THE CASE

Unlike the Petition, the Fourth Circuit's opinion contains a succinct and unbiased statement of the facts. Respondents will not restate them here.

The Fourth Circuit held that:

1. First Union's and Southern's silence about discussions that occurred at their January 11, 1984, meeting was not misleading;

2. Any discussions that occurred during the meeting were not material and did not require disclosure;

3. Any conduct which allegedly was fraudulent or deceptive was not "in connection with" the purchase or sale of a security; and

4. Petitioner failed to prove a claim for breach of fiduciary duty under South Carolina law.

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* The respondents are First Union Corporation and its wholly-owned subsidiary First Union Corporation of South Carolina. They have no other parent companies, subsidiaries, or affiliates other than wholly-owned subsidiaries.

The Fourth Circuit reversed, ordering that judgment be entered in respondents' favor. *Taylor v. First Union Corp.*, 857 F.2d 240 (4th Cir. 1988).

REASONS WHY THE WRIT SHOULD BE DENIED

No basis for granting a writ of certiorari exists here. Petitioner cites no case decided in any circuit that even appears to conflict with the Fourth Circuit's ruling. The Fourth Circuit followed to the letter the precedents of this Court, including *Basic, Inc. v. Levinson*, 108 S. Ct. 978 (1988). Petitioner simply disagrees with the Fourth Circuit's conclusion that the evidence did not justify submitting this case to the jury.

I. THE FOURTH CIRCUIT'S HOLDING THAT RULE 10b-5 REQUIRES A NEXUS BETWEEN THE FRAUD AND THE SALE OF SECURITIES IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

In order for liability to be imposed under Rule 10b-5(3), there must be evidence that the defendant engaged in activities that "operate as a fraud or deceit . . . in connection with the purchase or sale of any security." Petitioner contends that the Fourth Circuit's reading of the "in connection with" requirement conflicts with decisions of this Court and other circuits. This contention has no merit.

The court of appeals correctly held that the evidence which petitioner contends met the "in connection with" requirement related not to the purchase or sale of any

security, but to Southern's firing of Taylor, her husband. Taylor expressed his desire to sell his stock at the moment he was fired. He never altered that decision. The only negotiations about Taylor's stock related to its price, not whether he wished to sell. Taylor, with full knowledge that First Union was the buyer, with full knowledge that the price of the stock could increase in the event of interstate banking, and against the advice of his attorney, sold his and petitioner's stock. The "fraud" of which petitioner complains was the pretext by which Southern encouraged Taylor to attend the meeting where he was fired, and the alleged threat to revoke his disability benefits. She cannot, and does not, claim that the firing itself was unjustified or fraudulent. So even if Taylor's discharge was "in connection with" the stock sale, it was not "fraudulent."

Petitioner contends four cases are "at odds with" the decision of the Fourth Circuit. Petition at 7-8. However, each case she cites required a nexus between the fraud and the sale of a security. Furthermore, each court found no Rule 10b-5 violation. Those decisions are consistent with the Fourth Circuit's opinion.

In *Rochelle v. Marine Midland Grace Trust Co.*, 535 F.2d 523 (9th Cir. 1976), the court affirmed the dismissal of a Rule 10b-5 claim for failure of the plaintiff to satisfy the "in connection with" requirement. Petitioner cites language from this case relating to the scope of the "in connection with" requirement, but fails to inform the Court that the quoted paragraph goes on to state:

> No comprehensive definition of these tactile concepts is practicable; rather each alleged scheme must be examined in its own context to determine whether

> the deception . . . caused injury to persons suing who bought or sold securities . . . .

535 F.2d at 529. The only other circuit court decision cited by petitioner, *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974), states that determining whether the "in connection with" requirement has been met should be done on a case-by-case basis. In the present case, the Fourth Circuit examined the alleged scheme in its own context, and found no connection with the sale of a security.

Petitioner then contends two district court cases conflict with the Fourth Circuit. Even if these cases are in conflict, which they are not, this would not merit certiorari. The Fourth Circuit holding that no fraud occurred "in connection with" the sale of a security does not conflict with the law of any other circuit.

II. THE FOURTH CIRCUIT CORRECTLY CONCLUDED THAT THERE WAS INSUFFICIENT EVIDENCE OF A CONSPIRACY.

Petitioner asserts that the Fourth Circuit failed to interpret correctly her "conspiracy" evidence. Petitioner makes no argument that the Fourth Circuit's decision in any way conflicts with decisions in other circuits or with any decision of this Court. Rather, she only complains that the Fourth Circuit ruled wrongly on the quantum of evidence necessary to support a conspiracy claim. Thus petitioner's argument, even if meritorious, would not warrant consideration on certiorari.

Furthermore, the argument is specious because petitioner relies on "facts" which are taken out of context,

mischaracterized, or both. Petitioner implies that notes of a First Union executive mentioning an "agreement in principle" and an "agreement to merge" were taken at the January 1984 meeting and show that First Union and Southern reached such an agreement. Petitioner ignores the fact that these notes were made long before the meeting, and simply listed alternatives available when First Union was considering investing in southeastern banks.

Similarly, petitioner claims that Taylor's termination was planned to get him to sell his stock to First Union. This has no support in the record. The uncontroverted evidence is that Southern's management learned of the impending resignation of Taylor's entire management team. This intensified Southern's mounting concerns about Taylor's bizarre behavior and management failures, and led to the decision to terminate his employment. Petitioner argues that Southern fired Taylor to make him sell his stock. Taylor was under no obligation to sell, and offered to do so on his own initiative.

Even if evidence of a conspiracy had been presented, this evidentiary issue fails to meet the standard for review on certiorari.

III. THE FOURTH CIRCUIT STRICTLY FOLLOWED *BASIC, INC. V. LEVINSON.*

Petitioner asserts that the Fourth Circuit's opinion is irreconcilable with *Basic, Inc. v. Levinson,* 108 S. Ct. 978 (1988). In fact, the Fourth Circuit followed *Basic* to the letter.

Basic requires a fact specific inquiry to determine whether preliminary merger negotiations are material

and must be disclosed. The Fourth Circuit conducted such an inquiry and found none of the factors listed in *Basic*. Neither respondent had previously denied the possibility of a future merger. On the contrary, Southern had publicly identified itself as a potential acquisition target should interstate banking become legal. As is pointed out by the Fourth Circuit, the respondents' discussion prior to petitioner's sale of her stock resulted in no more than "a vague 'agreement' to establish a relationship." *Taylor v. First Union Corp.*, 857 F.2d 240, 244 (4th Cir. 1988). There were no agreements as to price or structure, no board resolutions, no actual negotiations, and no instructions to investment bankers to facilitate a merger. Furthermore, at the time of the 1984 discussion and First Union's purchase of petitioner's stock, no merger was possible because this Court had yet to rule on the constitutionality of interstate banking. *Id.*

As the Fourth Circuit stated, to require disclosure of such tentative discussions "would result in endless and bewildering guesses as to the need for disclosure, operate as a deterrent to the legitimate conduct of corporate operations, and threaten to 'bury the shareholders in an avalanche of trivial information.' " *Id.* at 245.

CONCLUSION

The questions raised in the Petition for a Writ of Certiorari do not rise to the level of substance and importance worthy of this Court's attention. The issues satisfy none of the requirements of Rule 17 of this Court. The

Petition for a Writ of Certiorari should, therefore, be denied.

Respectfully Submitted,

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